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8
9 UNITED STATES DISTRICT COURT

10 DISTRICT OF ARIZONA

11 In Re Bard IVC Filters Products
12 Liability Litigation

No. MD-15-02641-PHX-DGC

13 SHERR-UNA BOOKER, an individual,

14 Plaintiff,

15 v.

16 C.R. BARD, INC., a New Jersey
17 corporation and BARD PERIPHERAL
VASCULAR, an Arizona corporation,

18 Defendants.

19
20 **PLAINTIFF'S MOTION IN LIMINE #13**
AND MEMORANDUM IN SUPPORT
TO EXCLUDE REFERENCE TO
ALLEGED FAULT OF NON-PARTY
SARWAT KAMAL AMER, M.D.

21 (The Honorable David G. Campbell)

22 (Oral Argument Requested)

23
24 **MEMORANDUM SUPPORT OF PLAINTIFF'S MOTION IN LIMINE TO**
EXCLUDE REFERENCE TO ALLEGED FAULT OF NON-PARTY SARWAT
KAMAL AMER, M.D.

25 Plaintiff moves *in limine* for a pretrial ruling to preclude Defendants (“Bard”) from
26 presenting evidence or argument regarding the alleged fault of Sarwat Kamal Amer, M.D.,
27 in the causation of Plaintiff’s injuries. Although Bard filed a Notice of Non-Party Fault¹
identifying Dr. Amer’s alleged acts or omissions as the sole proximate cause and/or
contributing cause to Ms. Booker’s injuries, Bard has not disclosed expert testimony

28
29 ¹ See Exhibit A, Defendants’ Notice of Non-Party Fault (Doc. 8844), November 13, 2017.

1 supporting proximate cause for consideration by a jury as required by Georgia law.

2 *Zaldivar v. Prickett*, 297 Ga. 589, 591, 774 S.E. 2d 688, 691 (2015)

3 **MEMORANDUM OF LAW**

4 Under O.C.G.A. § 51-12-33(c), the jury “shall consider the fault of all persons or
 5 entities who contributed to the alleged injury or damages, regardless of whether the person
 6 or entity was, or could have been, named as a party to the suit.” The jury may only
 7 consider such alternative fault if a named defendant gives notice no later than 120 days
 8 before the date of trial and sets forth specific information about the non-party including a
 9 statement of the basis for arguing the non-party is at fault. O.C.G.A. 51-12-33(d)(1-2).
 10 On November 13, 2017, Bard served a Notice of Non-Party Fault claiming alleged acts or
 11 omissions of Dr. Amer, a radiologist involved in Ms. Booker’s care, were the sole
 12 proximate cause or a contributing cause of Ms. Booker’s injuries:

13 Dr. Amer was the diagnostic radiologist who read Plaintiff’s [x-ray] on March 26, 2009 which showed her G2 Filter had
 14 fractured . . . Dr. Amer failed to properly report the condition of Plaintiff’s filter to her treating physicians and therefore
 15 prohibited her treating physicians from fully evaluating her medical condition and options for treatment. This failure
 16 constituted the sole proximate cause and/or contributing cause to Plaintiff’s injuries.
 17

18 See Exhibit A.

19 However, Bard has not identified an expert or evidence showing that the alleged
 20 non-party’s fault caused or contributed to Plaintiff’s injuries. Under Georgia law, to argue
 21 the fault of a non-party such as Dr. Amer, Bard must show that (1) Dr. Amer committed a
 22 tort (medical malpractice), and (2) the tort was a proximate cause of Ms. Booker’s
 23 injuries. *Zaldivar*, 297 Ga. at 591, 774 S.E. 2d at 691 (stating that a trier of fact can only
 24 consider the alleged fault of a non-party when the “the non-party is shown to have
 25 committed a tort against the plaintiff that was a proximate cause of his injury.”); *Swint v.*
 26 *Mae*, 340 Ga. App. 480, 482, 798 S.E. 2d 23, 25 (Ga. Ct. App. 2017) (citation omitted).
 27 “A mere showing of negligence without proof of causation” is not sufficient. *Id.*

1 Moreover, causation can only be established through expert testimony, which Bard has not
 2 supplied. *Id.*

3 Bard's attempt to apportion fault to Dr. Amer fails. Bard has offered no expert
 4 opinion establishing that Dr. Amer's review of Ms. Booker's x-ray on March 26, 2009 or
 5 establishing that failure to report the condition to Ms. Booker's treating physicians was
 6 the proximate cause or contributed to the injuries Ms. Booker is claiming in this matter.

7 "When presenting a causation opinion, the expert is required to 'express some basis
 8 for both the confidence with which his conclusion is formed, and the probability that his
 9 conclusion is accurate.'" *Zwiren v. Thompson*, 276 Ga. 498, 501, 578 S.E. 2d 862, 865
 10 (Ga. 2003) (citation omitted). An expert may also meet the causation requirement by
 11 stating that "the only apparent cause of the plaintiff's injury was the defendant's action."
 12 *Killingsworth v. Poon*, 167 Ga.App. 653, 657, 307 S.E. 2d 123, 126 (Ga. Ct. App. 1983).
 13 In other words, a defendant cannot blame a non-party healthcare provider for allegedly
 14 injuring a plaintiff without proof that the alleged negligence was a cause or contributed to
 15 the harm. Bard has conspicuously failed to meet this burden.

16 Bard has produced two expert witnesses who comment on the x-rays Dr. Amer
 17 reviewed: Dr. Sobieszczyk and Dr. Cousin. Neither physician has testified or otherwise
 18 disclosed in their reports any opinion establishing the necessary causal link between
 19 Dr. Amer's alleged failure to report any finding of filter failure on the March 26, 2009 x-
 20 ray and how a report would affect an ordering physician. In fact, Dr. Sobieszczyk
 21 admitted in his deposition he was not asked to provide an opinion as to the standard of
 22 care applicable of any of Ms. Booker's physicians who may have received the imaging
 23 report. Dr. Sobieszczyk also admitted that his opinions did not address any criticism of
 24 Dr. Amer. *See Exhibit B, Deposition Testimony of Piotr Sobieszczyk, M.D., at 45:6–*
 25 *46:18.*

26 Bard may attempt to argue that opinions of defense expert Dr. Cousin establish
 27 causation on its non-party defense. Here again Bard is wrong. According to his report,
 28 Daniel Cousin, M.D., holds the opinion that by "failing to identify and report the

abnormal appearance of the inferior vena cava filter, the diagnostic radiologists [Dr. Amer] prevented Ms. Booker's treating physicians from having information to assess her medical condition pertaining to her IVC filter." Exhibit C, Expert Report of Daniel Cousin, M.D., at 5-6. He also testified that Dr. Amer's review of Ms. Booker's x-ray on March 26, 2009 was a "missed opportunity." Exhibit D, Deposition Testimony of Daniel Cousin, M.D., at 135:16-19.

7 But neither his report nor his testimony include any opinion as to how an alleged
8 “missed opportunity” contributed to the cause of Ms. Booker’s injuries or even what the
9 standard of care applicable to the physician who ordered the imaging might require.
10 Dr. Cousin does not explain, let alone offer an opinion, that an interpretation of filter
11 malposition would have led to an attempted removal, that such removal would have been
12 successful, or even how a different report to Ms. Booker’s other physicians might have
13 changed the course of her treatment. Indeed, any such opinions would be improperly
14 based on sheer speculation and, therefore, inadmissible.

15 Accordingly, the Court should enter an Order granting this motion and ruling that
16 Bard has not established a non-party at fault defense under Georgia law as to Dr. Amer,
17 and thus Bard cannot make any such argument or introduce any evidence or testimony
18 that Dr. Amer bears any fault for Plaintiff's harm.

19 || RESPECTFULLY SUBMITTED this 26th day of January, 2018.

GALLAGHER & KENNEDY, P.A.

By: /s/ *Mark S. O'Connor*

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of January, 2018, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing.

/s/ Gay Mennuti